In The Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–166

REGIONAL RAIL REORGANIZATION CASES

RICHARD JOYCE SMITH, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*, Cross-Appellees

ON CROSS-APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF OF CROSS-APPELLANT

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INTRODUCTION

This reply brief is submitted on behalf of Cross-Appellant, Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and "New Haven," respectively). This brief will address the contentions made by the United States and the other governmental parties (herein collectively the "United States") in the brief for the Federal Appellees dated September, 1974, and the separate brief of United States Railway Association ("USRA") dated September 26, 1974.

This reply brief is in of two parts. Part One consists of an argument in reply to points made by the Cross-Appellees. Part Two is an analysis of the opinion of the Special Court dated September 30, 1974 holding that Penn Central is required to reorganize pursuant to the Regional Rail Reorganization Act of 1973 ("RRRA").

The Penn Central Trustees intervened in the action below as defendants, aligned with the United States and USRA as supporters of the constitutionality of the RRRA based on the alleged existence of a "Tucker Act remedy" under 28 U.S.C. §1491. On this cross-appeal the Penn Central Trustees, while maintaining their original position that the RRRA is allegedly constitutional because of the putative existence of a Tucker Act remedy, have parted company with the United States and USRA and have aligned themselves with the New Haven Trustee. The Penn Central Trustees take the position that the constitutional issue of whether the RRRA violates the New Haven Trustee's Fifth Amendment rights is ripe for adjudication; and the Penn Central Trustees argue that, absent a definitive judgment as to a Tucker Act remedy, the RRRA is unconstitutional insofar as it would, in an eminent domain context, fail to assure that the Penn Central estate will receive money or its perfect equivalent in an amount equal to the highest and best use value of its properties. See Penn Central Trustees' brief as Appellant in No. 74-165 (at 30-47, as to interim erosion taking; at 48-54, as to ripeness of permanent taking issue; at 54-62, as to the failure of the RRRA to assure just compensation for either interim erosion takings or the permanent taking; at 63-65, as to limits upon the defenses that may be deemed open to the United States in any Tucker Act action; and at 65-67, as to valuation of Conrail securities at actual fair market value rather than on a capitalization-of-prospective-earnings valuation).

PART ONE: ARGUMENT IN REPLY TO CROSS-APPELLEES

I

THE CONSTITUTIONAL ISSUES RAISED BY THE CROSS-APPEAL ARE RIPE FOR ADJUDICATION

The United States and USRA seek to have the Court defer consideration of the constitutional issues presented based on the dual contention that "manifold uncertainties" attend the operation of the RRRA, and that "later and better opportunities" are available for judicial determination of the New Haven Trustee's claim that the RRRA, on its face, offends his Fifth Amendment rights. United States' brief at 16-24. USRA makes a similar argument, but in addition claims that the interim erosion taking issue decided by the court below is not ripe for adjudication. USRA's brief at 15-33.

A. The Alleged Existence of a Tucker Act Remedy Does Not Operate to Make Constitutional Issues Premature Because an Action for an Inadequately Compensated Taking Will Lie Only if the RRRA Is Constitutional

A pervasive fallacy in the Federal Appellees' prematurity contention is the premise that the Tucker Act, by providing post-conveyance judicial review of the adequacy of the compensation for a taking by eminent domain, will provide an alternative form of judicial review of the same constitutional issues raised here. This premise is fallacious because, as we have previously shown (New Haven Trustee's brief as Appellee at 62-64), the Government's argument places the cart before the horse: the Tucker Act claim will be a valid cause of action only if the RRRA is a constitutionally valid exercise of the sovereign's power of eminent domain. But that is the very issue which the United States and USRA claim is premature.

B. The New Haven Trustee Will Not Have a "Later and Better Opportunity" to Have an Adjudication of His Claim that the RRRA's Compulsory Conveyance Provisions Are Unconstitutional

Aside from the Tucker Act remedy argument, the only basis upon which the United States and USRA suggest that there will be a "later and better opportunity" to adjudicate the constitutional issues now presented is that the New Haven Trustee might apply to a court convened under 28 U.S.C. §2284 on some day prior to the 60th day after submission by USRA to Congress of a final system plan, for an injunction against certification of such a plan by USRA to the Special Court pursuant to §209(c) of the RRRA.

But the RRRA itself will frustrate any attempt to secure subsequent judicial review because the injunction action which USRA claims could be brought at a later date is specifically barred by §209(a), first sentence, if not granted before the end of the 60th calendar day after submission of a final system plan to Congress:

> "Notwithstanding any other provision of law [a phrase which presumably includes all of Title 28, United States Code], the final system plan which is adopted by the Association [USRA] and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section."

It should be noted that, even while arguing that the present action is premature, the United States and USRA have carefully refrained from stipulating that they will not, in a subsequent action before a §2284 court, raise the issue of the allegedly exclusive jurisdiction of the Special Court.[1]

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[1]The issue of exclusive jurisdiction of the Special Court has already been raised once in *Smith v. United States* before the Judicial Panel on

(footnote continued on next page)

Thus, the only court with unassailable jurisdiction to enjoin certification to the Special Court of a final system plan is the Special Court itself. However, the Special Court's decision as to any application for an injunction is foreordained by its decision dated September 30, 1974 holding that Penn Central is subject to the RRRA on the basis of there being a Tucker Act remedy to rectify any failure of the RRRA to compensate Penn Central for its interim erosion and for the taking of its properties.[2]

The alleged "later and better opportunity" offered by the United States for the Court to adjudicate the constitutional issues now presented does not in fact exist for precisely the reasons set forth in the New Haven Trustee's brief as Cross-Appellant (at 24-31 and 34-35). The Government's prematurity argument, it is submitted, is not an attempt to assist this Court in de-

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Multi-District Litigation, and decided against the United States and USRA. *In re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166 (J.P.M.L. March 25, 1974). The Panel's *Per Curiam* decision stated: "The Panel has carefully considered the respective contentions of the parties and finds that transfer of these actions under Section 209(b) of the Act to the Special Court must be denied." However, it can be expected that in response to any future action to enjoin implementation of the RRRA, the United States and USRA will apply to the Special Court for an injunction prohibiting suits in other courts. It is not clear that such an injunction, if granted, could be appealed to this Court.

[2] *In the Matter of Penn Central Transportation Co.* (Special Court, Regional Rail Reorganization Act, No. 74-8, *et al.*, Sept. 30, 1974). The Special Court has stayed its mandate of reversal of Judge Fullam's Order No. 1596 (JA 152) pending a decision by this Court on the instant cross-appeal and the related appeals (Nos. 74-165, 74-166, 74-167 and 74-168). If the Court does not reach the issue of the unconstitutionality of the RRRA, and of the existence of a Tucker Act remedy, the Special Court's decision will stand that the RRRA is constitutional and that a Tucker Act remedy exists under which the Penn Central Trustees and its creditors may sue the United States for money damages in the Court of Claims. See Part Two, *infra*, for an analysis of the Special Court's decision.

ciding the constitutional issue at a time when more facts about the final system plan will be known. The United States would prefer to postpone adjudication of the constitutionality of the RRRA until Conrail's take-over of Penn Central's rail properties is an accomplished fact. At that point, the New Haven Trustee and the New Haven bondholders will be remitted to the Court of Claims as their only remedy, without even a decision here that a valid cause of action exists in the Court of Claims.

II

THE NEW HAVEN TRUSTEE, AS A SECURED CREDITOR OF PENN CENTRAL, HAS STANDING TO ASSERT PENN CENTRAL'S RIGHTS UNDER THE FIFTH AMENDMENT, AS WELL AS HIS OWN RIGHTS, SINCE DIVESTMENT OF HIS LIENS BY §303(b)(2) OF THE RRRA IS A TAKING OF HIS PROPERTY WITHOUT JUST COMPENSATION

The United States' brief (at 24-25) challenges the standing of the New Haven Trustee to seek injunctive relief. USRA apparently concedes the standing issue.[3] The United States' standing argument is without substance.

First, the New Haven Trustee as a secured creditor of Penn Central, with a claim of some $124 million, plus interest, in default for over four years, has an obvious financial stake in a proposal under which a major portion of Penn Central's rail assets will be, in effect, converted into securities of uncertain market value. The New Haven Trustee claims that it is unconstitutional for Congress to require that Penn Central's

[3]See USRA's brief at 34 n.30.

rail assets be exchanged solely for securities of Conrail and USRA, without a *prior* judicial determination that the securities of Conrail and USRA have a fair market value equal to the highest and best use value of the properties conveyed. It is obvious that the New Haven Trustee has a direct financial stake in Penn Central sufficient to sustain his standing.

Second, the United States' argument ignores the challenge which the New Haven Trustee makes in his own right, *qua* secured creditor of Penn Central, that the divestment of *his* lien by §303(b)(2) of the RRRA is unconstitutional on its face.

Section 303(b)(2) provides in pertinent part:

> "(2) All rail properties conveyed to the Corporation [Conrail] and the respective profitable railroads . . . under this Section shall be conveyed free and clear of any liens or encumbrances. . . ."

The New Haven Trustee's standing as a lien creditor to challenge this portion of the RRRA is clear. *Cf. Armstrong v. United States*, 364 U.S. 40 (1960).

III

THE RRRA, CONSIDERED AS A REORGANIZATION STATUTE, IS INVALID AS A VIOLATION OF THE FIFTH AMENDMENT'S DUE PROCESS AND TAKINGS CLAUSES

The United States' brief (at 26-34) and USRA's brief (at 33-50) make an elaborate argument to the effect that, the Fifth Amendment notwithstanding, Congress has the inherent power under the Bankruptcy Clause to enact the RRRA.[4]

The New Haven Trustee does not challenge the doctrine that Congress has broad authority under Art. I, §8, Cl. 4 to pass laws on the subject of bankruptcies. The issue is not whether such power exists, but whether in the RRRA Congress, in purporting to exercise it, has transgressed the limits of the Due Process and Takings clauses of the Fifth Amendment. See New Haven Trustee's brief as Cross-Appellant (at 37-51), wherein the legal and factual setting of the RRRA is analyzed. The RRRA is, as Judge Fullam has recognized, an "*amalgam* of sale, reorganization and eminent domain concepts." (JA 77; emphasis added). See New Haven Trustee's brief as Cross-Appellant (at 47-51).

Indeed, each time the United States and USRA assert that a Tucker Act remedy exists, they implicitly

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[4]The arguments ignore Fifth Amendment limitations, and assert only the positive power granted by Art. I, §8, Cl. 4, as is evident from the captions:

"A. The Rail Act Operates As A Reorganization Statute Under Which Creditors Have No Constitutional Right To Payment of Their Claims in Cash." (United States' brief at 26).

"A. Congress Has Broad Authority To Provide for the Adjustment of Creditors' Claims in Corporate Reorganizations." (USRA's brief at 35).

recognize that the RRRA is, at least in substantial part, an eminent domain statute. The Tucker Act remedy could exist only under the theory of "inverse eminent domain." See New Haven Trustee's brief as Appellee (at 38-64).

The cases cited by the United States and USRA to uphold the authority of Congress to pass laws providing for reorganization of financially embarrassed railroads stand only for the proposition that §77 of the Bankruptcy Act is valid legislation as applied to railroads which are able to reorganize, either on an income basis, or by sale of their properties to a trunk-line carrier, or conceivably by sale of their properties to public authorities in negotiated transactions or by condemnation.

The problem presented by the RRRA as it relates to Penn Central is that Penn Central cannot be "reorganized" in the accepted legal definition of that term. If Penn Central were an ordinary business corporation, and not affected with an overriding public interest, based on the findings of fact in Opinion and Order No. 1543 (JA 89-101) there would be no alternative to its being adjudicated a bankrupt and its properties liquidated for the benefit of its creditors and stockholders. If the overriding public interest does in fact require a different result, without regard to the wishes of the present owners of and claimants to Penn Central's property, then it is reasonably obvious that the constitutional power which Congress must look to is the eminent domain power. As Judge Fullam noted in his opinion below:

> "...the plain purpose of the entire arrangement [of the RRRA] would be to insure the continued availability of these rail properties for use in meeting the public need for continued rail service, without regard to the wishes of the present owners of the properties." (JA 78).

As the arguments for and against the Tucker Act remedy attest, the real issue in the New Haven Trustee's cross-appeal is not whether the RRRA can be sustained *entirely* as a Bankruptcy Clause enactment. The real issue is, given the "amalgam" of eminent domain, sale and reorganization concepts which find expression in the RRRA, can Congress enact a "chameleon" like statute which is supportable in part under the Bankruptcy Clause, but when that Clause is exhausted by Fifth Amendment limitations, can change color so as to be a putatively valid exercise, in part, of the eminent domain power.

IV

PENN CENTRAL IS ENTITLED TO RECEIVE THE HIGHEST AND BEST USE VALUE OF ITS PROPERTIES AS A COMPLETE TRANSPORTATION SYSTEM IN MONEY OR ITS PERFECT EQUIVALENT; THE NEW HAVEN TRUSTEE IS ENTITLED TO FORECLOSURE ON HIS LIENED PROPERTY, OR THE FAIR VALUE THEREOF

A. The Railroad Enterprise Which Would Survive the RRRA, if It Is Not Enjoined, Will Be in Substance a Public Authority

The United States and USRA seek to negate the clear implication of §301 of the RRRA that Conrail will, in substance, be a public authority with a governmentally appointed management.

The history of Penn Central's reorganization during the past four years strongly suggests that Conrail will be dependent upon the Government indefinitely

for its capital funds.[5] Penn Central could not, even with the priority accorded to Trustees' Certificates, raise capital funds except with government guarantees. Amtrak, which was originally in concept supposed to be a private for-profit enterprise, is not private and is not profitable; it is, rather, dependent upon annual congressional budget appropriations both to finance its capital expenditures and its enormous operating losses. The losses result in large part from its payments in excess of $100 million per year to Penn Central for intercity passenger train service, without the receipt of which Penn Central's loss would be much greater.[6]

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[5]In a speech to the Fourth Annual Transportation Forum on September 30, 1974, Arthur D. Lewis, Chairman of USRA, stated:

> "First, the task of restructuring the bankrupt railroads into an economically healthy system is one which will require substantial financial aid. The current state of the Penn Central demonstrates the dimension of the capital investment required to create an efficient, economical and dependable physical plant for the railroads of the region.
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> * * *
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> "Obviously, the problem is immense in scope and complexity. Penn Central has estimated that restoration of its properties will require over $3.3 billion, in 1973 prices, spent over the next eight years. Only a little over $2.0 billion will be generated internally and more than $1.0 billion will have to come from outside sources of capital. These figures are staggering, especially when viewed in the light of today's inflationary trends. This expenditure program will take place when costs will average half again as much as in 1973 (if we are lucky). The implications for the Association and for the entire rail industry as well are quite serious: much higher levels of revenues, investment and profitability will have to be achieved than ever achieved in the past, if private capital is to be used for the massive rebuilding requirements of railroad properties." Press Release of USRA, Office of Public and Governmental Affairs, Sept. 30, 1974, at 3.

[6]In the calendar year 1973, Amtrak's remuneration to Penn Central amounted to $131,510,000. Form R-1 Report, Schedule 600. In spite of payments received on account of contract service for Amtrak's account, Penn Central's passenger rail operations resulted in a loss (before fixed charges) of $45,825,000. Form R-1, Schedule 300, Col. (j).

In a Press Release dated August 22, 1974, a copy of which is reprinted as Appendix B to the September 30, 1974 decision of the Special Court,[7] USRA candidly acknowledges:

> "The level of rehabilitation . . . required and the possible payment of 'real' money [presumably as contrasted with paper securities] for the assets at some point in time *makes Conrail viability uncertain.* To protect government funding *against this risk of default* the law *already* sets up Presidential appointments as the majority of the *Conrail* board for an unspecified (but lengthy) period of time. The more federal funding required . . . the greater the risk of a *permanent federal role.*" Slip opinion at B-3 (emphasis added).

B. Since the RRRA is Invalid as Bankruptcy Legislation, the Compulsory Conveyance Provisions, Considered as an Exercise of Eminent Domain Power, Require Application of Principles of Condemnation Law to Determine Whether Payment of the "Constitutional Minimum" is Assured

USRA argues that establishment of the legal standard of "constitutional minimum" is one reserved by Congress exclusively to the Special Court, and that no prior decision of this Court has any bearing on the issue of the valuation methodology to be employed in giving body to the skeletal phrase "constitutional minimum" employed in the RRRA (USRA's brief at 58-64). This argument is not addressed to any relevant issue in this cross-appeal. The New Haven Trustee does not seek an advance declaratory judgment from the Court that will be binding on the Special Court when, as and if proceedings mandated by §303(c) of the

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[7] *In the Matter of Penn Central Transportation Co.* (Special Court, Regional Rail Reorganization Act, No. 74-8 *et al.*, September 30, 1974), slip opinion at B1-B3.

RRRA are instituted, which could only be *after* the conveyances provided in §303(b). The New Haven Trustee seeks to enjoin §303(b) from being implemented on the ground that it is unconstitutional insofar as §303(c) does not assure Penn Central or the New Haven Trustee of the receipt of money for their respective property interests.

C. Penn Central's Rail Properties Have a Condemnation Value as a Complete Transportation System Which is Greater than the "Bare Bones" Liquidation Value of its Rail Properties

USRA's brief (at 64-70) asserts that the precedents of the *Fifth Avenue Bus*[8] and *Hudson Rapid Tubes*[9] cases do not apply to a federal eminent domain statute. USRA claims that the United States is subject to a lesser standard of just compensation than the states when Congress concludes that a major interstate railroad has in the 1970's encountered the same difficulties which the urban street railways, subway systems and bus companies encountered in the period of the 1940's, 1950's and 1960's.[10] USRA does not spell out its rationale for contending that a railroad operating in more than one state has lesser constitutional rights than a railroad which operates, for example, solely in the State of New York. To the extent that relevant constitutional decisions of state courts are relied upon by the New Haven Trustee, those decisions are based on the Fifth Amendment's "just compensation" clause, and cite precedents of the Court interpreting

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[8] *In re City of New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub. nom. Fifth Avenue Coach Lines v. City of New York*, 380 U.S. 778 (1966).

[9] *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 743, *cert. denied sub. nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968).

[10] The United States' brief does not address this issue.

the United States Constitution as well as precedents of the state courts. For example, in the first decision by the Court of Appeals of New York in the *Fifth Avenue Bus* case, it was noted that:

> "When private property is taken for public use, our State and Federal Constitutions alike mandate the payment of 'just compensation' (N.Y. Const., art. I., §7; U.S. Const. 5th Amdt.)." 219 N.E. 2d at 415 (Keating, J., dissenting on other grounds).

The rationale of the majority of the Court of Appeals[11] stressed that a regulated public utility, whose rates were fixed in large part by political expediency rather than by the value of the service it performs for the public, is in a peculiarly disadvantageous position in a period of high inflation:

> "The problems raised in this condemnation proceeding are difficult and to a degree unique. In this era of spiraling inflation such proceedings will continually reoccur since it is beyond the resources of private enterprise to provide mass transportation at modest rates, dictated by political exigencies and confiscatory as far as the equity in the business is concerned." 219 N.E. 2d at 411.[12]

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[11]All seven judges of the Court of Appeals of New York approved the concept that the two bus companies (Fifth Avenue, which operated in Manhattan, and Surface Transportation, which operated in The Bronx) were entitled to be paid for their physical assets on the basis of "reproduction cost new, less depreciation;" and all seven judges further agreed that the bus companies were entitled to an additional amount reflecting their going-concern or "assemblage" value as complete transportation systems, in spite of the fact that their operations were substantially unprofitable. The Court of Appeals, in complete agreement on the law, split 4-3 as to whether the Appellate Division had correctly applied the law.

[12]*Cf.* USRA brief (at 66) arguing that any valuation of Penn Central that would allow value to be ascribed to Penn Central Company's stock interest in Penn Central would amount to "a rich $13.5 billion bonanza against which valid pre-bankruptcy claims may total no more than $2.7 billion." USRA plainly intends that the RRRA shall not result in any pay-

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Judge Burke then quoted from the Court's opinion in the *Monongahela Navigation* case,[13] indicating that in his view the words "just compensation" have the same meaning in the New York State Constitution as in the United States Constitution.

Judge Burke concluded:

> "In the case before us, claimants' property was a viable operative transit system and was taken as such, with a clearly expressed intent to so operate it after the forced transfer of title. . . . Claimants' undeniably competent and efficient personnel were taken over by the City along with the claimants' routes, franchises, operating schedules, accounting and maintenance records, etc.—all going concern assets for which claimants must be duly compensated." 219 N.E. 2d at 415.

The effect of the RRRA in transferring Penn Central as a complete transportation system to the ownership of Conrail is substantially identical.

The New Haven Trustee agrees that "condemnees may not demand an artificial or inflated value based on the public need."[14] He does not seek a "hold-up" value, as alleged by USRA (USRA's brief at 65). However, as all seven judges of the Court of Appeals recognized in the *Fifth Avenue Bus* case, when a public authority takes a privately-owned transportation facility for continued public use because of the public need for its service, and the inability of private enterprise to

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ment in respect of Penn Central Company's equity in Penn Central Transportation Company. It is also significant that USRA excludes approximately $1 billion of post-reorganization liabilities in comparing the reproduction-cost-new-less-depreciation value of the assets with the claims against the estate.

[13] *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

[14] Keating, J., dissenting on other grounds in the first *Fifth Avenue Bus* decision, 219 N.E. 2d at 415.

operate profitably, the condemnee, while not entitled to "hold up" the public or to claim an award based on the amount it would cost the public to construct a new facility having comparable public service benefits, is entitled to compensation for "assemblage" value of its transportation system beyond the "bare bones" of its physical assets valued under the reproduction-cost-new-less-depreciation formula.[15]

In the *Hudson Rapid Tubes* case, Judge Keating, who dissented in the *Fifth Avenue Bus* case, wrote the opinion of the court.[16] Judge Keating relied on this Court's holding in *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) that

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[15]Judge Keating, dissenting on other grounds, observed:

"In addition [to the value of the physical assets], there is real value attributable to the fact that these tangible assets are not isolated units. They are fully integrated and operating transit systems, held together by personnel available and working, franchises, operating schedules, established routes, accounting and maintenance records and all of the other elements which spell the difference between 'bare bones' and a transportation system in operation. These are but elements of a 'going concern' for which a buyer would willingly pay. . . . As elements of a business which have value, it is only proper that they should be considered part of the 'just compensation' to which the condemnees are entitled and so the case law has consistently held." 219 N.E. 2d at 416.

The cases cited by Judge Keating include the following decisions of this Court: *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Des Moines Gas Co. v. City of Des Moines*, 238 U.S. 153 (1915); *City of Omaha v. Omaha Water Co.*, 218 U.S. 180 (1910); *Denver v. Denver Union Water Co.*, 246 U.S. 178 (1918). *Kimball Laundry Co. v. United States, supra*, is cited in USRA's brief (at 67 n. 77 and 69 n. 83) as *contra* authority to the New York State Court decisions; it is not.

[16]USRA's brief at 69 states:

"In a forceful dissent, the author of the Fifth Avenue opinion [i.e. Judge Burke] noted the illogic of basing an award on original cost when the current market value did not reflect that cost."

The same Judge Burke, one year later, in his second *Fifth Avenue Bus* decision, 22 N.Y. 2d 613, 241 N.E. 2d 717 (1968), stated:

"In the *Port Authority* case, the 'willing buyer' rule was rejected and the rule set forth in *Fifth Avenue* reaffirmed." *Id.* at 720.

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" '. . . when [the] market value [of a condemnee's property] has been too difficult to find, or *when its application would result in manifest injustice to owner or public*, courts have fashioned and applied other standards.' " 231 N.E. 2d at 738, quoting 339 U.S. at 123 (emphasis supplied by Judge Keating).

The significance of the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases to the issues presented by this cross-appeal is as follows:

1. It cannot be the law that states are forbidden to take private property for public use without just compensation payable in money, but the federal government is not subject to the same strictures. Any suggestion that the rationale of *Fifth Avenue Bus* and *Hudson Rapid Tubes* is not applicable here because we are dealing with the Fifth Amendment's "just compensation" clause, and not the State of New York's "just compensation" clause, should be rejected. Contrariwise, if the compulsory conveyance provision of the RRRA were held to be a valid device by which the United States Government could take the properties of an interstate railroad for public purposes and issue securities of the taking authority as the payment therefor, then the State of New York could not be prohibited from authorizing, for example, a take-over of a

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It is obvious that Judge Burke's dissent in the *Hudson Rapid Tubes* case turned on his very different view of the facts: in his view, the tunnel railroad constituted a "decrepit, financially hopeless transportation system, tailored to the measurements of an ancient, badly mended tunnel. . . ." 231 N.E. 2d at 742 n.1.

On its facts, Penn Central more closely resembles the *Fifth Avenue Bus* situation than it does the *Hudson Rapid Tubes* situation. Penn Central's present plight is in large measure the result of years of regulatory constraints, including the necessity to operate money-losing passenger train and freight services. But for these regulatory constraints, Penn Central might well be a profitable railroad, just as Fifth Avenue Bus Company might have been profitable had it been allowed to charge fares determined solely by business considerations.

railroad such as the Long Island Railroad in exchange for securities of a state transportation authority. Yet such a result would be difficult to reconcile with the decisions interpreting the Fourteenth Amendment.

2. In the valuation of physical properties of a complete transportation system in condemnation, the whole may well be worth more than the sum of the parts. Whether the excess value is called "going concern value" or "assemblage" value, it is clearly a value which must be reflected in a condemnation award. That value need not be the same as today's cost in assembling transportation corridors, because today's assemblage cost would represent value to the condemnor, not loss to the condemnee.

3. On the other hand, the assemblage value is not proven to be zero by reason of the unprofitability of the private transportation system in the regulated environment in which it was forced to operate. That is the meaning of *Fifth Avenue Bus*. The United States cannot first insist that Penn Central incur large losses by requiring it to maintain rail passenger operations at huge deficits, and to service lightly used freight lines; and then, when it condemns the property for the same use, declare that the "going concern" value is zero because "substantial prices are not paid for the privilege of conducting a business at a loss."[17]

4. The value of the physical properties themselves will vary depending on whether they are single-use or multi-use properties and on many other factors. A series of railroad tunnels which bisect mid-town Manhattan and are absolutely essential for through passenger trains from Washington to Boston, as one

[17]Mr. Justice Cardozo in *Roberts v. City of New York*, 295 U.S. 264, 282 (1935), quoted in USRA's brief at 67.

example, are likely to have a value of a different order of magnitude than a tunnel of equal length bisecting mountains in rural Pennsylvania where alternative rail routings exist. The *Hudson Rapid Tubes* case does not stand for the proposition that historical cost less depreciation is the guide; if it did, it would be inconsistent with both the first and second *Fifth Avenue Bus* decisions, where the physicial assets were valued at reproduction cost new less depreciation. As the Court pointed out in *New Haven Inclusion Cases, supra,* 399 U.S. 392, 482 n. 80 (1970), the decisional principle for which both *Fifth Avenue Bus* and *Hudson Rapid Tubes* can be cited is that the New York courts "awarded the owners the value reflecting the highest and best price for their properties," which the Court held was "precisely the treatment accorded the New Haven" in its sale of rail properties to Penn Central.

The New Haven Trustee and the Penn Central Trustees are in agreement on the proposition that, in an eminent domain context, Penn Central is entitled to the highest and best use value for its properties. Such value will, in turn, assure secured creditors of Penn Central that they will receive either payment of their claim in full, or if the properties securing their claim have a lesser value, the value of the properties so determined. Such a result would be in perfect harmony with the Court's decision in *Wright v. Union Central Life Ins. Co.,* 311 U.S. 273 (1940), discussed in USRA's brief at 44-47. See also United States' brief at 26 and 32 n. 14.

D. The Governmental Appellees Cannot Have it Both Ways—Either the RRRA Is an Unconstitutional Attempt to Take Private Property Without Exercising Eminent Domain Powers; or the RRRA Is Equivalent to Nationalization of Penn Central

USRA mistakenly asserts that the New Haven Trustee affirmatively advocates nationalization of Penn Central, and seeks to have the Court exceed its proper role by advising Congress on "how to amend or replace" the RRRA. USRA's brief (at 70-72). This is a distortion of a section of the New Haven Trustee's brief as Cross Appellant which discusses a public interest solution which might, but only if Congress (not the Court) concurred, be deemed a navigable route between the Scylla of a complete cessation of rail operations in the most heavily industrialized area of the United States and the Charybdis of a Tucker Act judgment against the United States Treasury amounting to hundreds of millions or billions of dollars. See New Haven Trustee's brief as Cross-Appellant (at 88-92).[18]

The Federal Appellees should not be permitted to have it both ways at once—either the RRRA is sustainable as eminent domain legislation, in which case there is a Tucker Act remedy; or it is not so sustainable, in which case it is unconstitutional.

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[18]To carry the metaphor one step further, it is a well-charted seaway marked by the nearly universal experience of the industrialized democracies—England, France, Germany, Italy, Switzerland, Japan and even, to a great extent, Canada—all of whom have nationalized their more important railroads while allowing peripheral lines to remain private. It is not a demonstrable fact that these nations have experienced "higher costs and inefficiencies that public ownership implies." USRA's brief at 71. Moreover, as the New Haven Trustee pointed out (Cross-Appellant's brief at 89 n. 81), if Conrail proves to be profitable, the United States can turn it back to the private sector; if it turns out to be not profitable, the case law suggests that the economic burdens must be distributed equitably via taxation.

The New Haven Trustee does not, as USRA asserts

> "prefer to have that [a public-interest solution] accomplished by nationalization, a process he believes will constitutionally entitle him to compensation wholly in cash, and possibly in a much higher amount than obtainable in reorganization." USRA's brief at 71.

The New Haven Trustee's position, so far as here relevant, is set forth at 88-92 of his brief as Cross-Appellant, and speaks for itself. Contrary to USRA's characterization of his argument, the New Haven Trustee believes that the value of the properties subject to his liens is in excess of $123,809,404 plus interest; he believes, based on his knowledge as to the value of these rail properties, that he will ultimately receive $123,809,404 plus interest; he cannot, under any imaginable circumstance, claim *more* than $123,809,404 plus interest; and, so long as he retains his liens and ultimately receives either the right to foreclose on his properties or the cash equivalent of his foreclosure right, the New Haven estate will receive the protection accorded by the Fifth Amendment and the Court's decision in *New Haven Inclusion Cases.*

Under the theory of *Armstrong v. United States, supra,* it is reasonably clear that the United States cannot expropriate, without payment, the New Haven Trustee's liens securing his $123,809,404 claim. This case concerns expropriation, not nationalization. See §303(b)(2) of the RRRA. USRA asserts that the Court's role is limited to adjudicating whether the RRRA is constitutional or not. The New Haven Trustee agrees. If the Court upholds the Tucker Act argument of the United States and USRA, however, it is reasonable to infer from the views of the sponsors of this legislation in both the House and the Senate that Congress may well decide to repeal the RRRA. If the Court upholds

the injunction issued below, but does not reach the issue raised by the New Haven Trustee's cross-appeal, Congress will be in the dark as to the limits of its constitutional powers when it comes to amend or repeal the RRRA. If the Court decides the cross-appeal in favor of the New Haven Trustee, Congress will be on notice as to the applicable Fifth Amendment principles. That will fulfill the Court's role, and leave the political decision to Congress and the President.

V

THE LACK OF PRE-CONVEYANCE JUDICIAL REVIEW OF THE FAIRNESS AND EQUITY OF THE MANDATORY CONVEYANCES OFFENDS DUE PROCESS

USRA attempts to justify the RRRA's failure to afford procedural due process by comparing it to §77(o).[19] However, §77(o) relates essentially to incidental sales; a sale of the nature that would be involved in the compulsory transfer to Conrail has been held to be beyond the scope of §77(o).[20] Further, §77(o) provides significant safeguards that are absent from the RRRA. For example, no transaction of sale may be effected under §77(o) unless the trustees of the debtor, who have fiduciary duties to the creditors and stockholders, affirmatively recommend that it is in the best interest of the debtor's estate; and even then any proposed transaction must be approved *as to its specific terms* by the reorganization court.

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[19] "The whole of the Rail Act is very roughly analogous to Section 77(o). . . ." USRA's brief at 41.

[20] *In re Penn Central Transportation Co. (Park Avenue Properties)*, 484 F. 2d 323 (3d Cir.), *cert. denied sub nom. Baker v. Morgan Guaranty Trust Co. of N.Y.*, 42 U.S.L.W. 3334 (U.S., Dec. 3, 1973).

More to the point is a significant concession contained in the United States' brief:

> "We concede that in the absence of a Tucker Act remedy the bankrupt estates would as a group be constitutionally entitled to a preconveyance judicial determination of the fairness and equity of the total amount of the consideration payable under the final system plan." United States' brief at 39.

The New Haven Trustee concurs with that view of the United States, so far as it goes. Aside from the RRRA being inadequate from the point of view of compensation when analyzed as a taking statute, it is also deficient insofar as §§303(b) and (c) require the Special Court to order conveyances willy-nilly, before determining whether the final system plan certified by USRA is "fair and equitable," and permit only a subsequent review of the merits or lack thereof of the final system plan under the fair and equitable rubric.[21]

On this issue, *Catlin v. United States*, 324 U.S. 229 (1945), discussed in the New Haven Trustee's brief as

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[21] Before the Special Court, the United States and USRA argued that the Special Court would, under the statutory time-table, have 110 days after Congressional approval of the final system plan before having to order transfer of the properties, and that such period could be utilized to review the *prima facie* fairness and equity of the plan. (The same argument as to timing is made here; see USRA's brief as Cross-Appellee at 30-31; 33 n. 29). The New Haven Trustee pointed out that the RRRA provides no procedure for that *prima facie* review and that the Government has it in its power to reduce the 110 days to 11 or 12 days. The Government continued to press its position before the Special Court, which has held that even 110 days would not afford it enough time to make a meaningful preconveyance decision as to whether the final system plan is fair and equitable to the Penn Central estate. Yet when it became expedient to adopt the argument that the 110 days could be shortened, the Government parties did so. See transcript of the hearing on September 19, 1974 before the Penn Central Reorganization Court, at 13,627-30. When it was pointed out that Congress was considering postponing the RRRA time-table by 120 days, the United States responded that the conveyance need be only slightly delayed because the Government could "speed up" the period between Congressional approval and transfer. *Id.* at 13,630.

Appellee (at 59 n. 50) is in point. *Catlin* involved an eminent domain statute under which the United States took property for military purposes. The statute provided for title to be vested in the United States in advance of any judicial determinations as to the legitimacy of the taking. The Court construed the statute to permit post-taking reconveyances of the property, saying:

> "The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity *or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity.*" 324 U.S. at 241 (emphasis added).

The United States argues that under §303(b) of the RRRA, once conveyances are ordered by the Special Court (apparently without any pre-conveyance appellate review), "reconveyance of all the rail properties would not be feasible" (United States' brief at 38 n. 17),[22] even if the Special Court finds in its subsequent §303(c) proceedings (a) that the final system is not fair and equitable, and (b) that none of the remedies provided by the RRRA suffice to cure the lack of fairness and equity. Such findings, if made by the Special Court, or if made by this Court on its §303(d) review of the Special Court's §303(c) decision, will mean that an unconstitutional final system plan will have become final and binding on the parties, who presumably are then remitted to a possible Tucker Act remedy in the Court of Claims. And, as previously shown (New Haven Trustee's brief as Appellee at 67-75), Congress

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[22]Contrary to note 17 of the United States' brief, the New Haven Trustee does not "assume . . . that reconveyance of all the rail properties would not be feasible." However, reconveyance, which might be required to rectify unconstitutional takings, would be much less desirable, both to private and public interests, than a pre-conveyance injunction.

could then act to prevent any Tucker Act remedy, either by repealing the sovereign's consent to suit or by refusing to appropriate the funds required to enable the Secretary of the Treasury to satisfy execution upon any Court of Claims judgment. The above-cited concession by the United States (United States' brief at 39) is fatal to its case. The lack of pre-conveyance judicial review (including appellate review here of any decision by the Special Court), based on actual knowledge of the terms of the final system plan, as to the fairness and equity of the mandatory conveyances as applied to individual railroads, such as Penn Central, takes property without due process of law, irrespective of whether or not the provisions for compensation in the form of securities of a public authority are valid.

PART TWO: LEGAL ANALYSIS OF THE SPECIAL COURT'S SEPTEMBER 30, 1974 DECISION, IN THE MATTER OF PENN CENTRAL TRANSPORTATION CO. (NO. 74-8)

I

PROCEDURAL STATUS OF SPECIAL COURT'S DECISION IN RELATION TO THE INSTANT APPEALS AND CROSS-APPEAL

On September 30, 1974, the Special Court, Regional Rail Reorganization Act (Henry J. Friendly, Presiding Judge, Carl McGowan and Roszel C. Thomsen, Judges) entered a conditional order reversing the Penn Central Reorganization Court's Order No. 1596[23] (JA 124-152), as well as that Court's Secondary Debtor decision (JA 153-56). The order of reversal was conditioned by a stay pending further order of the Special Court after a final determination by the Court of this cross-appeal and the related appeals (Nos. 74-165, 74-166, 74-167 and 74-168), and the Special Court reserved jurisdiction to modify its opinion and order in light of the decision of the Court.

The Special Court refused to give *res judicata* or collateral estoppel effect to the prior judgment of the three-judge district court below in *Connecticut General Ins. Corp. v. United States Railway Ass'n.* and related cases which are the subject of these appeals and cross-appeal; at the same time, the Special Court has indicated that it will give preclusive effect to the Court's decision herein:

> "We also state, for whatever bearing it may have, that the last thing we have in mind is to impair in

[23]The Special Court left in effect the Reorganization Court's Order No. 1543, from which no appeals were taken except the New Haven Trustee's appeal limited to jurisdictional issues. The findings of fact in support of Order 1543 are accordingly still in effect.

any way the [Supreme] Court's freedom of action in the *Connecticut General* appeal." *In the Matter of Penn Central Transportation Co.*, Special Court, Regional Rail Reorganization Act, Nos. 74-8 *et al.*, September 30, 1974, slip opinion by Friendly, J., at 35.

Because of the potential importance of the Special Court's analysis of the RRRA, and the conflict between its view of the constitutional safeguards afforded to claimants to the Penn Central estate by the Fifth Amendment and that of the *Connecticut General* court, the New Haven Trustee has included in this Reply Brief an analysis of the Special Court's decision, indicating both the areas with which the New Haven Trustee is in accord and the areas in which the New Haven Trustee respectfully submits that the Special Court was in error. In the following discussion, however, the New Haven Trustee will refrain from any extensive analysis of the evidenciary conclusions of the Special Court based on its record, which is not before the Court at this time and is not relevant to the decision of the constitutional issues presented for decision on the appeals and cross-appeal. Since the Special Court has indicated that its decision ultimately will be guided by the Court's decision of the instant cross-appeal and the related appeals, a definitive conclusion by the Court of the legal issues properly posed by the summary judgment motions of the plaintiffs below and here, in the context of the appeals and cross-appeal, is both legally warranted and of extreme importance to the public and private interests involved. The New Haven Trustee submits that the Court should hold that the RRRA is unconstitutional, either by sustaining the judgment of the court below or by reversing that judgment on the grounds urged by the New Haven Trustee in this cross-appeal; if the Court so holds, the Special Court will be required by its own

indication to enter an order affirming the §207(b) order (Order No. 1596) of the Penn Central Reorganization Court. Thus, the matter will have been properly and expeditiously decided as requested by all the parties in the joint motion for expedited treatment.

The Special Court's decision did not, of course, constitute a reversal of the judgment of the three-judge district court convened under 28 U.S.C. §§2282 and 2284; only this Court has appellate jurisdiction to hear appeals from a judgment declaring an act of Congress unconstitutional. While the Special Court's conclusions as to the existence of a Tucker Act remedy are in apparent disagreement with the court below, it is submitted that the Special Court was in error, as more fully developed in the following analysis of Judge Friendly's Opinion. See *infra* at 47-48 for a discussion as to the grounds upon which the decision of the Special Court may properly be remedied by the Court, and as to the appropriate procedural dispositions to be made in this case.

II

ANALYSIS OF SPECIAL COURT'S OPINION

The Special Court's Opinion relating to Penn Central consists of an introductory section (at 1-26) plus eight numbered sections dealing with discrete issues, each of which is summarized below.

A. *Introduction* (1-26)

This section contains a general statement of the case (at 1-10) and summary of the RRRA (at 11-26). Aside from the point noted below,[24] the summary is largely accurate.

B. *Jurisdiction* (26-32)

The Special Court's Opinion does not, it is submitted, correctly address the Article III issues raised by the New Haven Trustee. The New Haven Trustee did not argue that the "case or controversy" was lacking because of the lack of adversary pleadings (Opinion at 27). The following head note of the New Haven Trustee's brief in the Special Court summarized the argument actually made on this point:

> "Even if §207(b) is interpreted not to confer new jurisdiction upon a §77 court, it requires an Article III court to exercise legislative and administrative functions and to issue an advisory opinion."[25]

The New Haven Trustee cited the following cases in support of that contention: *National Mutual Ins. Co.*

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[24]See Opinion at 24, n. 20, stating that "it is common knowledge" that the labor protective conditions in the Penn Central merger were a cause of the Penn Central debacle. It is unlikely that this was a significant cause, particularly as compared with the crew-consist issue, as to which see n. 21. The RRRA provides no relief from excessive and needless costs in the crew-consist area.

[25]Brief of New Haven Trustee, Appellant as to jurisdictional issues, before the Special Court (No. 74-8), August 2, 1974, at 11.

v. Tidewater Transfer Co., 337 U.S. 582 (1949); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting, explaining the position of a majority of the Justices in the *Tidewater Transfer* case); *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., concurring: "It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements, or, what in some instances may amount to the same thing, without regard to them.").

The Special Court's Opinion fails to address the arguments actually made by the New Haven Trustee. The applicability of the cases cited above are not discussed at all. Further, the decision of the Special Court as to the Tucker Act remedy is in fact an advisory opinion in the sense that it will not be a final judgment unless Congress, upon reviewing the situation, decides that it is willing to contemplate the entry of a deficiency judgment against the United States in the Court of Claims.[26] We respectfully disagree that *McGrath v. Kristensen*, 340 U.S. 162 (1950) is the answer to the New Haven Trustee's contention that §207(b) called for an advisory opinion as to a matter upon which Congress retains the ultimate power of decision in §208. The New Haven Trustee cited *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) and more recent authority, such as *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) for the proposition that §207(b) called for a non-judicial decision as to a matter subject to legislative revision. Indeed,

[26]Congress may act to preclude a Tucker Act judgment of substantial amount either by vetoing all final system plans submitted to it under §208(a), or by amending the RRRA to limit expressly the potential liability of the United States. Neither of these steps would constitute a repeal of the Tucker Act; but each would effectively make the United States immune to suit, or limit the aggregate dollar amount of any liability to which Congress chooses to expose the Treasury.

the indication that the Special Court may not have the power to bind the Court of Claims (Opinion at 106 n. 109[27]) as to the existence of any substantive cause of action, or as to the amount of damages if there be such a cause of action, makes its entire Tucker Act remedy discussion (see Sections VII and VIII, at 83-117) an advisory opinion, contrary to both Article III limitations and the Court's holdings in *United States v. Sherwood*, 312 U.S. 584 (1941) and *United States v. King*, 395 U.S. 1 (1969).

Finally, the Special Court disposed of Part II of the New Haven Trustee's brief on jurisdictional issues[28] on the ground that it "falls by the wayside" in view of the pendency of these appeals before the Court. (Judge Friendly's Opinion at 31-32). Since the New Haven Trustee was contending that the RRRA improperly affected the outcome of a case or controversy (his §77(g) Motion) which was pending at the date of enactment of the RRRA, a matter which is not now before the Court, the Special Court erred in dismissing this contention. The New Haven Trustee cited *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), *Battaglia v. General Motors Corp.*, 169 F. 2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948), *Lockerty v. Phillips*, 319 U.S. 182 (1943), and *Yakus v. United States, supra*, in support of his position that §207(b) was repugnant to the Constitution insofar as it purported to withdraw the Reorganization Court's power to dismiss the re-

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[27]Note 109 reads: "We intimate no opinion to what extent, if at all, the Court of Claims would be bound by our determination as to the value either of the compensation issuable under the Act or of the assets conveyed." See *infra* at 44-46 for a discussion of this point.

[28]This argument was headnoted:

"§207(b) Confers New Jurisdiction Upon the Reorganization Court and this Court, and Withdraws Jurisdiction from the Supreme Court, in a Designed Attempt to Dictate a Rule of Decision in a Pending Case, the New Haven Trustee's §77(g) Motion." (at 28).

organization proceedings under §77(g) of the Bankruptcy Act. The New Haven Trustee further contended that the latent power to dismiss under §77(g) is the constitutional "safety-valve" under which secured creditors of Penn Central have been restrained from exercising their contractual rights for over four years. The Opinion addresses none of these contentions; and yet the Special Court's order expressly prohibits entry of an order under §77(g) by any of the reorganization courts.

C. *Collateral Estoppel* (32-35)

The Special Court was admittedly faced with a situation not contemplated by Congress when it established the Special Court and required it to render an appellate decision in a number of distinct cases arising from appeals of orders of reorganization courts under §207(b). Prior to the decisions by the respective reorganization courts, a three-judge federal court with jurisdiction of the subject matter and the persons of most of the parties to the Penn Central proceeding had adjudicated that the RRRA was void in certain respects for repugnance to the Constitution; and that decision was on appeal and cross-appeal to this Court. The Penn Central Reorganization Court in its §207(b) decision, Opinion and Order No. 1596, seems not to have given the *Connecticut General* decision binding effect, but Judge Fullam explained that this was necessitated by the refusal of a majority of the three judges to reach and decide the issue of the constitutional validity of the compulsory conveyance provisions (JA 125).[29] Judge Friendly, however, declares that the Special

[29]Judge Fullam, concurring below, stated that:

"The policies embodied in 28 U.S.C. §2282 appear applicable in this case. . . . It is preferable that the deliberate and collegial judgment of this three-judge court should determine the constitutionality of the RRRA's conveyancing provisions." (JA 59).

Court is not bound even by decisions of the duly constituted §2284 court on issues which it did reach—such as the non-availability of a Tucker Act remedy. The ground cited is that Congress did not intend that the Special Court's decision could be governed by a prior decision of another district court. Yet, it is undisputed that Congress left 28 U.S.C. §§2282 and 2284 in effect as to any complaint asserting that an act of Congress is unconstitutional.[30] Moreover, irrespective of Congress' intent, a duly constituted Article III court has already declared that the RRRA is unconstitutional and is not saved by the alleged existence of a Tucker Act remedy; and that court's decision is reviewable *only* by this Court. In upholding a collateral attack upon the prior holdings of a court with clear jurisdiction of the subject matter, the Special Court has seemingly assumed that it has jurisdiction to set aside the judgment of the §2284 Court. Recognizing that, without more, a non-appealable decision by the Special Court might itself be viewed as a final disposition of issues, such as the constitutionality of the RRRA and the alleged existence of a Tucker Act remedy, a wholly untenable position, the Opinion (at 34) declares that "great cases often demand departures from procedural rules" otherwise applicable. The Opinion asserts that because of the alleged non-reviewability of the Special Court's decision (based on the last sentence of §207(b), a provision which the New Haven Trustee contends is itself void under Article III) its decision should not be permitted to have a preclusive effect on this Court in the instant cross-appeal and related appeals. By accepted jurisprudential standards, the Special Court should

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[30]On March 25, 1974, the Judicial Panel on Multidistrict Litigation denied the attempt of the governmental parties herein to transfer all constitutional litigation under the RRRA to the Special Court. *In re Litigation under the Regional Rail Reorganization Act of 1973*, Docket No. 166 (J.P.M.L. March 25, 1974). See *supra* at 4, n. 1.

have deferred to the holding of a fellow district court of the United States in a case in which, though the decision was under appeal as to its merits, the other court had clear jurisdiction of the subject matter and the parties. See Hart & Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) at 1232-34.[31] See also *New Haven Inclusion Cases, supra,* 399 U.S. at 419-30.

D. *The Requirement of Uniformity* (35-37)

In the *Connecticut General* decision, a majority of the court (Judges Fullam and Bechtle) held that the RRRA is invalid insofar as it rests on the Bankruptcy Clause because it is not, on its face, a uniform law on the subject of bankruptcies. Judge Aldisert agreed that the RRRA failed to comply with the uniformity requirement, but reasoned that creditors of Penn Central, who are treated alike regardless of where they reside, lack standing to raise the constitutional defect of want of uniformity. The Special Court, having decided that it was not bound by the *Connecticut General* decision, adopted the position of the United States and USRA, that had also been advanced by them below and rejected without discussion by the §2284 court, that the RRRA is uniform legislation due to the happenstance that all active railroads in reorganization were, on January 2, 1974, located in geographical areas which are within the defined region. It is respectfully submitted that the Special Court's disposition of the uniformity issue was in error.

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[31] "Should it be a postulate of federal judicial administration that there ought to be no more than one trial of a controversy between the same parties at the same time in the federal courts, and that accordingly, when duplicating actions of this kind are instituted, the only problem is to decide which action should be allowed to proceed?" *Id.* at 1232.

E. *Fair and Equitable Process—General Considerations* (37-41)

The Special Court in this section of its Opinion has made some general observations[32] which are pertinent only to the inquiry which the Special Court was engaged in: a determination whether the process of the RRRA will be fair and equitable. The Special Court correctly pointed out that if the RRRA is unconstitutional as to any non-severable provision, it must be held not fair and equitable. It is for this reason that the Special Court's ultimate judgment cannot stand if the Court sustains the holding below as to uncompensated interim erosion, or if the Court accepts the argument of the New Haven Trustee that the compulsory conveyance provisions are unconstitutional.

F. *Erosion of Investors' Rights* (41-57)

The Special Court wholly disagreed with the *Connecticut General* court's handling of the interim erosion issue. The Special Court's view of erosion is based on the authority of Judge Friendly's 1969 opinion in the New Haven proceedings,[33] which is cited (Opinion at 44) to sustain the proposition that Penn Central

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[32]The New Haven Trustee must respectfully disagree with one of the Special Court's observations:

> "The idea that billions of dollars of liquidation proceeds of these bankrupt railroads are lurking just around the corner is unrealistic in the last degree." Opinion at 39.

This statement, carried to its logical conclusion, would mean that Penn Central will be a "bankrupt bankruptcy," unable to pay even its priority administration claims, now in excess of $1 billion. It also casts grave doubt upon there being any Tucker Act remedy.

[33]In *New York, N.H. & H. R.R., First Mortgage 4% Bondholders' Committee v. United States*, 305 F. Supp. 1049, 1055-59 (S.D.N.Y. 1969), *rev'd sub nom. New Haven Inclusion Cases, supra*, 392 U.S. at 419-30, a three-judge district court headed by Judge Friendly approved two "discounts" on liquidation value of New Haven's rail assets imposed by the ICC (334

(footnote continued on following page)

could not achieve a termination of operations except after lengthy proceedings before the ICC. It is submitted that the earlier case is improperly cited, and that the Court's opinion in *New Haven Inclusion Cases*, 399 U.S. at 461, did not affirm the decision of the three-judge court headed by Judge Friendly. The Court did not even pass on the merits of Judge Friendly's earlier opinion, because it ruled that the three-judge Court headed by Judge Friendly should have deferred to the New Haven's reorganization court (Anderson, j.).[34]

Part IV of the Opinion is accordingly premised on the erroneous legal concept that the public interest is entitled to two "bites of the apple,"[35] the first comprising the period during which creditors can constitutionally be restrained while efforts to reorganize the railroad are explored, and the second, a period in which the ICC and the state regulatory agencies can process abandonment applications in the usual and

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(footnote continued from prior page)

I.C.C. 25 (1968)), one based on an assumed one-year delay by the ICC in acting upon a hypothetical abandonment application (the granting of which, the court held, would have been constitutionally required) and the other a "bulk sale" discount, based on an alleged risk factor that a hypothetical buyer of properties in bulk would have discounted for if he purchased the properties at the date the ICC finally approved the hypothetical abandonment application. Judge Weinfeld dissented on both points, 305 F. Supp. at 1066-69. The New Haven's reorganization court rejected these discounts imposed by the ICC. *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793, 800 (D. Conn. 1969), *aff'd sub nom. New Haven Inclusion Cases, supra*, 392 U.S. at 457-73.

[34]Had the Court passed on the merits of Judge Friendly's opinion in 305 F. Supp. at 1055-59, it would have reversed. This is abundantly clear from the dissenting opinion of Justices Black and Harlan, who would have reviewed the decisions of both district courts and sustained the discounts imposed by the ICC, thereby affirming Judge Friendly's opinion at 305 F. Supp. at 1055-59. See *New Haven Inclusion Cases, supra*, 399 U.S. at 502.

[35]*In re New York, N.H. & H. R.R., supra*, 304 F. Supp. at 801, quoted, with approval, *New Haven Inclusion Cases*, 399 U.S. at 466.

customary fashion as though no Fifth Amendment rights were at stake. It is further submitted that *Palmer v. Massachusetts*, 308 U.S. 79, 88 (1939) does not stand for the proposition for which it is cited in the Opinion (at 44). *Palmer* is clearly applicable during the period prior to a finding that the railroad is not reorganizable on an income basis within a reasonable time, but its applicability thereafter is doubtful in the light of *New Haven Inclusion Cases*.

Judge Fullam has found Penn Central not to be reorganizable on an income basis under §77; all parties to this cross-appeal and the related appeals agree with that conclusion. Earlier the ICC had found that Penn Central could be reorganized only with massive government aid.[36] By taking the position that the ICC can in the public interest subject a railroad in reorganization to a kind of "one last chance" doctrine (in Judge Friendly's words, "a final opportunity to come up with plans that may prevent serious injury to the public interest"—Opinion at 44), the Special Court has undermined the doctrine of the *Brooks-Scanlon* line of cases,[37] while at the same time giving lip service to its continued vitality.

Having incorrectly determined the law applicable to erosion and the right of creditors to demand a reasonably prompt cessation of deficit rail operations once it has been determined that the railroad is not reorganizable, the Opinion then compares the effect of the RRRA, particularly §304(f), to the prospects "that would have prevailed in its absence." (Opinion at 47).

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[36] *Penn Central Transportation Company Reorganization*, Report on Reorganization Plans, Finance Docket No. 26241 (ICC, September 28, 1973), J.D.S. 54.

[37] *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920); *Bullock v. Railroad Commission of Florida*, 254 U.S. 513 (1921); *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79 (1924).

Assuming that the Fifth Amendment notwithstanding, Congress and the ICC could subject Penn Central to the task of proving no adverse environmental impact as a result of a total cessation of service, see *Harlem Valley Transportation Ass'n. v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd.*—F. 2d—(2d Cir. 1974), Judge Friendly concluded that the RRRA by making the National Environmental Policy Act of 1969 ("NEPA") inapplicable (RRRA, §601(c)), simply replaces one burdensome set of regulatory hurdles to abandonment with another. It is submitted that this conclusion is incorrect. The Opinion does not deal with the argument that NEPA itself would be unconstitutional if it prevented, or unduly delayed, a decision permitting cessation of operations to which the Penn Central creditors would be otherwise entitled by reason of the Fifth Amendment.

Turning to a factual discussion of the erosion issue, the Special Court first defines erosion incompletely,[38] and then asserts that there is no "convincing evidence" in the record that erosion is likely in the 620 days (which has now become 740 days, see USRA's brief as Appellee at 3 n. 1) prior to the first date a final system

[38]Judge Friendly's minimum definition of erosion includes issuance of trustees' certificates, deferral of property taxes, accrual of other administration expenses, and use of cash or property subject to mortgages for payment of operating expenses. Opinion at 51. Each of these elements is a consequence of continued net losses from operations; but such net losses produce other forms of erosion. In any event, the minimum definition fails to treat with the following elements of erosion: decline in value of railroad equipment due to retirements in excess of depreciation reserves; the excess of depreciation of equipment and of track and structures, to the extent that it reflects actual wear and tear and obsolescence, over new investment therein; borrowings otherwise than on trustees' certificates from the Government and its agencies to the extent used to defray operating expenses in excess of revenues from rail operations; and diversion of non-rail income from real estate and investments to defray operating expenses.

plan can become effective.[39] Not only does the Opinion fail to treat with the evidence of erosion in the record (such evidence consisting primarily of undisputed facts that are stipulated in this proceeding), but it seemingly reverses the trial court's findings of fact in Opinion and Order No. 1543 (JA 84-103) without any determination that they are erroneous under the standard for appellate review and in a situation where neither the Government nor USRA had appealed Order No. 1543. Judge Fullam found that Penn Central will have *negative* cash available for operations of $153,700,000 at December 31, 1975, a date which is within the 740 days allowed for a final system plan to become effective. Opinion and Order No. 1543, Finding of Fact No. 26 (JA 99-100). *Negative* cash of this magnitude necessarily will require the financing of *cash* deficits by borrowings having the priority of administration claims.

The Opinion as to erosion indicates that the Special Court viewed its role under §207(b) of the RRRA as one calling for a trial *de novo*, not an appellate proceeding. It appears that the Special Court considered that it could reach its own conclusions without regard to the factual findings of the reorganization courts.[40] In the erosion discussion, the Opinion places great weight on the 10% temporary rate increase granted by the ICC in *Ex Parte 305* (see Opinion at 52 and n. 44, 45)

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[39]The court below correctly granted summary judgment on the ground of uncompensated interim erosion, treating the Stipulation as to Factual Matters and the uncontested findings of fact of Judge Fullam in Opinion and Order No. 1543 (JA 84-103) as conclusive evidence that some erosion was likely in the 620 days preceding the effective date of any final system plan.

[40]Thus, in a later section (Opinion at 70-83), the Special Court decides how much weight it considered appropriate to give to the respective witnesses on Conrail viability, without regard to the findings of the respective reorganization courts.

and even concludes, based on the month of July, 1974 (a month following the trial court's decision)[41] that Penn Central's operations will now be profitable (on the basis of net railway operating income, not net income after fixed charges). See Opinion at 54 n. 49. The Special Court, which was plainly given an appellate function by §207(b), erred when it applied its own views to the facts of the case *de novo*.[42]

G. *The Compelled Conveyance and the Adequacy of the Consideration* (57-83)

The New Haven Trustee agrees with the Special Court's analysis of §§302 and 303 of the RRRA as the product of congressional reasoning which was too "simplistic" (Opinion at 61); and with the observation:

> "The mere fact, if it be one, that Conrail might make *some* profit would not necessarily give its securities a value sufficient to render them fair compensation." *Id.* (emphasis in original; footnote omitted).[43]

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[41]Section 207(b) of the RRRA required a decision by the reorganization courts not later than July 1, 1974, and accordingly reliance upon evidence arising after that date by an appellate court is improper.

[42]On review of the §2284 court's decision, this Court's role is of course limited to the determination of whether the trial court's judgment is supported by substantial evidence. As Mr. Justice Stewart observed in *New Haven Inclusion Cases, supra*:

> "It is not for us to pass upon the myriad factual and legal issues as though we were trying the cases *de novo*. 'It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end.' " 399 U.S. at 435, quoting *Group of Institutional Investors v. Chicago, M., St. P. & Pac. R.R.*, 318 U.S. 523, 564 (1943).

[43]If the Special Court's observation (Opinion at 60) that:

> "Congress is entitled to insist on the continued operation of rail lines earning or capable of earning a profit. . ." (footnote omitted)

(footnote continued on following page)

The New Haven Trustee agrees with the analysis of the deficiencies of §303(c)(2) of the RRRA (Opinion at 62-67); that section "fails to supply an adequate tool with which to cure any deficiency in the consideration." (Opinion at 67).

Thus, the Special Court found that, absent a Tucker Act remedy, the process of the RRRA is not fair and equitable (Opinion at 68-69), since there was no showing that the combination of Government guaranteed obligations, the securities of Conrail and the "other benefits" would provide just compensation. (Opinion at 69-83).[44]

(footnote continued from prior page)

means that Congress is entitled to insist on continued operation of a line or segment of railroad so long as that line or segment makes a positive rather than negative contribution to net railway operating income, even if not sufficient to provide any return on invested capital, then it is far too broad and not supported by the Court's modern decisions, such as *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[44]It is appropriate to note in passing that the entire discussion of Conrail viability (Opinion at 69-83) is based on a *de novo* trial approach, rather than appellate review of evidence in the record; and this error is compounded by the use in the Penn Central case of evidence from the Ann Arbor case which was never subjected to cross-examination. See Opinion at 80-81. Considered as a *de novo* trial, the proceedings before the Special Court were unfair to the Penn Central estate and its creditor and stockholder claimants, and violated due process of law, because no opportunity was afforded to parties who submitted evidence as to Conrail's non-viable status to introduce evidence or to cross-examine evidence relied upon by the Special Court. Not only was the decision in the appeal from the Penn Central Reorganization Court decided on the basis of evidence *dehors* the record in that proceeding, but the Government and USRA in effect disavowed the Ann Arbor evidence on the ground that it is not possible at this time to know what form Conrail will take, thereby requiring all predictions as to its viability to be based on assumptions which cannot be verified. See transcript of hearings before the Special Court at 85, 88, 91-92. Moreover, the states of Wisconsin and Michigan, which introduced evidence as to Conrail's potential viability in the Ann Arbor proceeding, where, by agreement, it was not subjected to cross-examination, had standing to introduce the same evidence in the Penn Central proceedings (where it would have been subject to cross-examination) and did not do so.

H. *Availability of a Remedy Under the Tucker Act* (83-102)

The Special Court's analysis of the Tucker Act remedy issue is exclusively premised upon the conclusion that the *jurisdiction* of the Court of Claims was not repealed, expressly or impliedly, by the RRRA. The New Haven Trustee submits that the judgment below, that there is no Tucker Act remedy, is sound whether or not the jurisdiction of the Court of Claims was repealed.

The Special Court stated that its disagreement with the *Connecticut General* court was that the court stated the wrong issue; according to the Opinion, the issue is whether Congress expressed an affirmative intent "to withdraw a remedy that would otherwise exist." Opinion at 85. The Opinion thus fails to differentiate between (a) affirmative intent to withdraw the consent of the sovereign to suit and withhold jurisdiction affirmatively granted in 28 U.S.C. §1491 to the Court of Claims, and (b) assuming that the waiver of sovereign immunity and conferral of jurisdiction are still in effect, affirmative intent to preclude any plaintiffs from being able to prosecute a substantively valid cause of action in the Court of Claims.[45]

The Opinion does not discuss any of the cases relied on by the New Haven Trustee in his Tucker Act remedy analysis save *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which is dismissed with the observation:

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[45]The Court of Claims has itself recognized this critical distinction, pointing out that: "... it is not every claim involving or invoking the Constitution, a federal statute or a regulation which is cognizable here." See *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002, 1007 (Ct. Cl. 1967), quoted in New Haven Trustee's brief as Appellee at 38-40.

"The basis of the doubt [as to adequate remedy at law in the Court of Claims for the seizure of the steel mills] was that the Executive's action there was without authorization in law." Opinion at 102, n. 106.

The Special Court thus did not address the New Haven Trustee's contention that *Youngstown* has a different meaning which is to be derived from the Court's citation in *Youngstown* of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).[46] So far as the New Haven Trustee can discover, no case has ever held that an *unconstitutional* taking has an adequate remedy at law in the Court of Claims, although there are legions of inverse eminent domain cases holding that a constitutional taking which is inadequately compensated gives rise to a valid cause of action under the Tucker Act.

The Opinion correctly discounts the applicability of *Hurley v. Kincaid, supra*, to the problem at hand (Opinion at 94-99), but then relies upon another opinion of Mr. Justice Brandeis, *Lynch v. United States*, 292 U.S. 571 (1934) (Opinion at 99-102). *Lynch* involved an unusual action by Congress which came very close to repudiation of the public debt, just as the RRRA involves an unprecedented attempt by Congress to exercise the power to cancel the contractual rights of mortgage bondholders.[47]

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[46] *Youngstown* is a case where equitable relief was deemed appropriate because the governmental action complained of was unconstitutional, thereby qualifying under the test of *Larson* (as explained in *Malone v. Bowdoin*, 369 U.S. 643 (1962)) for the applicability of the doctrine of *United States v. Lee*, 106 U.S. 196 (1882). *Youngstown*, and numerous other cases which relied on the *Lee* decision, stand in contrast to cases where the government action alleged to constitute a taking is conceded by the condemnee to be constitutional (*e.g.*, *Hurley v. Kincaid*, 285 U.S. 95 (1932); *United States v. Causby*, 328 U.S. 256 (1946); and *Larson*).

[47] The *Lynch* opinion casts doubt on the availability of a substantive cause of action in the Court of Claims by its holding that Congress retains the power to withdraw the consent of the sovereign to suit. See 292 U.S. at 581-82.

I. *The Adequacy of the Remedy Under the Tucker Act* (102-116)

The Opinion (at 104) cites *Bauman v. Ross*[48] for the proposition that Congress is not bound to provide compensation in money or its perfect equivalent for a taking under the eminent domain power. It is submitted that *Bauman v. Ross* holds only that if the condemning authority's activity will benefit land of the condemnee not taken, that benefit may be taken into account in determining the condemnee's loss as to the land which is taken. *United States v. 1,000 Acres of Land, More or Less, in Plaquemines Parish, La.*,[49] stands for the same proposition. The extravagant dictum contained in the latter opinion, quoted by the Special Court (Opinion at 105), cannot be reconciled with recent decisions of the Court.

At most, the cases cited in the Opinion (at 104-105) stand for the proposition that "other benefits" conferred upon a condemnee by the sovereign may be taken into account in determining a condemnation award. It is doubtful that the RRRA confers "other benefits" upon the holders of railroad mortgages, and it is likewise doubtful that "other benefits" are conferred upon the Penn Central estate. The privilege to discontinue common carrier operations, which is a right conferred by the Fifth Amendment, is not such an "other benefit."

The Opinion adverts to the problem posed by the *Sherwood* and *King* cases, *supra*, barring an effective declaratory judgment by the Special Court in its §303(c) proceedings that could be binding on the Court of

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[48]167 U.S. 548 (1897).

[49]162 F. Supp. 219 (E.D. La. 1958).

Claims, but never reveals the Court's judgment on this issue. Opinion at 106 n. 109. Under *Sherwood* and *King*, the Special Court's §303(c) judgment as to the existence of a "shortfall" for which a remedy exists in the Court of Claims will be an advisory opinion binding on no one. Rather than being an "exercise in literalism" (Opinion at 102 n. 106), the contention that the Special Court should not have even considered the Tucker Act remedy was well founded in the doctrine of sovereign immunity discussed in the *Sherwood* and *King* cases.

The New Haven Trustee agrees that marketable debt instruments guaranteed as to principal and interest by the United States may be, in fact, the perfect equivalent of money if they carry a current market rate of interest. The issue, however, is whether a "shortfall" remedy in the Court of Claims is adequate (assuming it exists as a valid cause of action) if it compensates only for the difference between condemnation value of the property, on the one hand, and a theoretical value of Conrail securities plus $500 million of Government guaranteed obligations, on the other. Conrail's securities may in fact have a market value much less than the amount which is determined to be their "face value" for issuance in a reorganization. The nub of the controversy here is whether market value or so-called "intrinsic" value will govern. If the Court of Claims were to accept the Special Court's "shortfall" rationale, there might, in fact, be no recovery in the Court of Claims for the difference between the "intrinsic value" of Conrail's securities and their actual market value.[50]

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[50]The RRRA is uniquely burdensome in this regard because the securities will be valued by the Special Court many years before they are likely to achieve the status of a publicly traded security. For example, §77 plan proceedings for Penn Central that will result in distribution of the condemnation proceeds, might well take the better part of a decade, con-

(footnote continued on following page)

The Opinion advances the proposition that there can be a statute which, while not valid as a Bankruptcy Clause enactment alone, is valid as a Bankruptcy Clause enactment if supplemented by an eminent domain power. The same statute is both a "reorganization" and a "taking" at one and the same time, so that even though it would be invalid solely as a reorganization or solely as a taking, it is valid as an amalgam of the two. (Opinion at 105-108).

The Bankruptcy Clause and the eminent domain power have never before been considered to complement one another, so that a statute which fails as a reorganization law because it provides securities of insufficient value, and fails as an eminent domain law because it pays compensation otherwise than in money or its perfect equivalent, can be held valid because of a remedy in the Court of Claims.

(footnote continued from prior page)

sidering the multitude of proofs of claim filed and Penn Central's extraordinarily complex debt and lien structure. And the §77 plan proceedings cannot even begin until after completion of "horrifyingly" long valuation proceedings in the Special Court, appellate review by the Court, and then a lengthy Court of Claims proceeding. Thus, under the statutory scheme of superimposing the RRRA on §77, a traditionally lengthy process has become a modern day equivalent of Charles Dickens' *Jarndyce v. Jarndyce*, and the "escape valve" based on unreasonable delay (§77(g)) has been removed. If, as is likely, the 21st century will have been closely approached, or even reached, before the Conrail securities will be available for distribution, it is clear that their fair market value when received may be far less than the "intrinsic" value determined by capitalization of projected earnings. Even if the Penn Central Trustees could shorten this process by securing Reorganization Court approval to sell the Conrail securities, such sale would presumably have to await conclusion of a Tucker Act deficiency judgment proceeding. Unless Conrail had reported substantial net income for one or more years, it is unlikely as a practical matter that an underwritten public offering of Conrail's common stock could take place, particularly in the light of disclosure requirements of the Securities Act of 1933. Accordingly, there may not be a public market where Conrail's securities can be traded, and thus no way to ascertain their fair market value.

CONCLUSION

Based on the foregoing, it is the position of the New Haven Trustee that:

1. The decision of the court below in *Connecticut General* should be affirmed insofar as it relates to the interim taking;

2. The court was correct in concluding that an adequate Tucker Act remedy is not available to cure the constitutional defects of the RRRA;

3. The court was correct in concluding that insofar as the RRRA is a law on the subject of bankruptcies it is in violation of the constitutional requirement of geographical uniformity;

4. The decision of the court below should be reversed, as requested in this cross-appeal, insofar as it failed to enjoin implementation of the compulsory conveyance provisions of the RRRA on the ground that they effect a taking of private property for public use without just compensation;[51] and

5. In deciding this cross-appeal and the related appeals the Court can properly disregard the Special Court's §207(b) decision on the ground that the decision below in *Connecticut General* was binding as to the constitutional issues decided and that, in other respects, the decision of the Special Court is not relevant to the issues here before the Court.

The order sought here by the New Haven Trustee will presumably cause the Special Court to modify its §207(b) order dated September 30, 1974 so as to affirm Order No. 1596 of the Penn Central Reorganization Court (JA 152), thus precluding application of the RRRA to Penn Central.

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[51]See New Haven Trustee's brief as Cross-Appellant at 107-09 for the precise terms of the order requested.

If after hearing argument of the instant appeals and cross-appeals, the Court were to consider that the RRRA is facially constitutional as to both its interim erosion and compulsory conveyance aspects, there would still remain issues determined by the Special Court as to the fairness and equity of the process of the RRRA, which urgently require review because of their constitutional implications. The record in the Special Court's §207(b) proceedings would then be required in order to adjudicate definitively all aspects of the case, including the issue of availability of a substantively adequate Tucker Act remedy, and it would be proper for the Court to withhold its decision in these cases pending a decision to review, pursuant to a writ of certiorari to the Special Court under 28 U.S.C. §1651, the Special Court's §207(b) order;[52] in such event, the petition for review of the Special Court's order could be consolidated with the instant appeals and cross-appeal for decision on the merits. The Court would thus be in a position to review the issue of whether or not the RRRA provides a process which is fair and equitable, an issue which must be reached in the event that the Court determines that a Tucker Act action exists, but otherwise need not be decided.

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[52]The New Haven Trustee plans to file with the Court, as soon as possible in the premises, such a petition for a writ of certiorari under 28 U.S.C. §1651 to review the Special Court's §207(b) order. The petition will assert that this Court has jurisdiction to issue the writ in aid of its appellate jurisdiction under §303(d); that there is no other statutory provision whereby the decision of the Special Court can be reviewed by the Court; that the last sentence of §207(b) of the RRRA purporting to preclude appellate review of the Special Court's §207(b) decision is void for repugnance to the Constitution; that §207(b) confers jurisdiction improperly in view of the constraints of Article III of the Constitution; and that the Special Court's decision on the merits was erroneous, based on errors of law and errors of fact.

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Respectfully submitted,

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